STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of ROBERT U. MAKAKOA, Complainant, and ALOHA PETROLEUM, LTD., Respondent, and DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Appellee.	CASE NO. OSH 2009-4 Discrimination Complaint ORDER NO. 381 ORDER

ORDER

Based upon a careful review of the record and the Respondent's Motion for Directed Verdict (Motion), filed on July 31, 2009, and the arguments made in opposition to the Motion, the Board grants the Respondent's Motion because Complainant failed to prove that he was retaliated against for reporting safety concerns under Hawaii Revised Statutes (HRS) § 396-8.

The purpose of the Hawaii Occupational Safety and Health Law, Chapter 396, HRS, is to encourage employee efforts at reducing injury and disease arising out of the workplace and to prevent retaliatory measures taken against those employees who exercise these rights.

HRS § 396-8 provides, in part:

> (e) Discharge or discrimination against employees for exercising any right under this chapter is prohibited. In consideration of this prohibition:
>
> * * *
>
> (3) No person shall discharge or in any manner discriminate against any employee because the employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or

> intends to testify in any such proceeding, or acting to exercise or exercised on behalf of the employee or others any right afforded by this chapter; . . . .

The burden of proof is the Complainant's to establish by a preponderance of evidence a prima facie case of discrimination.

> Courts have adopted the shifting burden of proof application in pretext cases to Section 11(c) retaliation claims. The Secretary bears the initial burden of demonstrating: (1) that an employee engaged in protected activity, (2) that the employee suffered an adverse employment action, and (3) that there was a causal nexus between the protected activity and the adverse action. Causation may be inferred from circumstantial evidence. The burden then shifts to the employer to proffer a permissive, nondiscriminatory reason for the employment action. Finally, the Secretary must demonstrate that the employer's reason is merely a pretext for discrimination.

Rabinowitz, Occupational Safety and Health Law, 1999 Cumulative Supplement, 400 (BNA Books 1999) (footnotes omitted.) See also, Jim Skellington v. City and County of Honolulu, Kapolei Fire Station, OSAB 97-015 (LIRAB August 29, 2001); and Kay Miura v. Pacific Ohana Hostel, Decision 2, OSAB 2002-16 (HLRB October 4, 2002) (Miura).

In Miura, supra, Decision 2, OSAB 2002-16 (HLRB October 4, 2002) the Board discussed the burden of proof in discrimination cases:

> The burden of proof is the Director's and/or Complainant's to establish by a preponderance of evidence[1] a prima facie case of discrimination.
>
> "Proof of a prima facie case of retaliatory discharge requires a showing that (1) plaintiff engaged in a protected activity, (2) the employer subjected her to an adverse employment action, and (3) a causal link exists between the

---

[1]The Complainant has the burden of proof as well as the burden of persuasion. The degree or quantum of proof is by a preponderance of evidence. HRS § 91-10(5). The preponderance of the evidence has been defined as "that quantum of evidence which is sufficient to convince the trier-of-fact that the facts asserted by a proponent are more probably true than false." Ultimate Distribution Systems, Inc., 1982 OSHD § 26.011 (1982).

> protected activity and the adverse employment action. (Citation omitted.) Like disparate treatment claims, the evidence necessary to establish a prima facie case of retaliatory discharge is minimal. (Citation omitted.) A plaintiff may satisfy the first two elements by demonstrating that [the plaintiff] was fired, demoted, transferred or subjected to some other adverse action after engaging in protected activity. The causal link may be inferred from circumstantial evidence such as the employer's knowledge that the plaintiff engaged in protected activity and the proximity in time between the protected action and the allegedly retaliatory employment decision." Marcia Linville v. State of Hawaii, et al., 874 F. Supp 1095, 1110 (D. Haw. 1994).

The Board finds based upon the evidence in the record that Complainant never reported safety concerns or issues with Jeff Finch, the decision maker, and that he was terminated because of insubordination, an inability to work with his immediate supervisor, and inventory control issues. The Board finds based on the record that the Complainant failed to prove that there was a causal link between the protected activity, i.e., complaining about unsafe conditions, and the adverse employment action, i.e., termination because there was no evidence that the decision maker even knew about the complaints. The Board therefore concludes that Complainant failed to establish a prima facie case of retaliation. Alternatively, Complainant failed to provide that Respondent's legitimate non-retaliatory reasons for Complainant's termination were pretextual.

Respondent has ten days, unless such time is extended by the Board, to draft the order and secure the approval as to form of opposing counsel or parties thereon and to file the original and five copies of the order, accompanied by a disk with a copy of the order, with the Board. If the form of the order has not been approved, a party served with the proposed order may file objections thereto and a copy of a proposed order, accompanied by a disc of the order, with the Board within five working days.

DATED: Honolulu, Hawaii, March 23, 2010.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair

SARAH R. HIRAKAMI, Member

ROBERT U. MAKAKOA v. ALOHA PETROLEUM, LTD., et al.
CASE NO. OSH 2009-4
ORDER NO. 381
ORDER

Copies sent to:

Robert U. Makakoa
Darin R. Leong, Esq.
Herbert B.K. Lau, Deputy Attorney General